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TRANSMITTAL OF APPEAL BRIEF (Small Entity)					Docket No. LEM1.P946	
In Re Application Of: Marc Lemchen						
<div style="text-align: center;">OFFICE JAN 18 2007 PATENT & TRADEMARK OFFICE</div>						
Application No. 09/746,947	Filing Date December 21, 2000	Examiner Duyen My Doan	Customer No. 23386	Group Art Unit 2152	Confirmation No. 2376	
Invention: A METHOD AND APPARATUS FOR THE USE OF A NETWORK SYSTEM FOR BIOFEEDBACK STRESS REDUCTION						

COMMISSIONER FOR PATENTS:

Transmitted herewith is the Appeal Brief in this application, with respect to the Notice of Appeal filed on:

☒ Applicant claims small entity status. See 37 CFR 1.27

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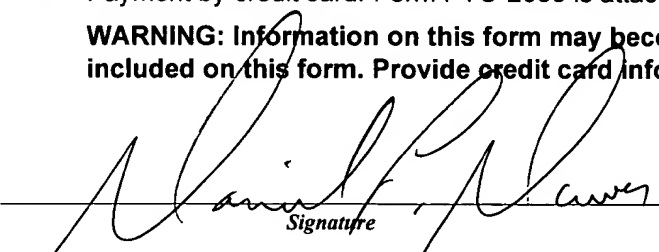
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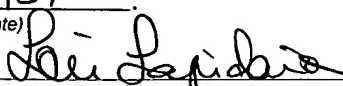
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Dated: **January 15, 2007**

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Patent
LEM1.P946

THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re application of: Marc Lemchen Serial No.: 09/746,947 Filed: Dec. 21, 2000 For: A METHOD AND APPARATUS FOR THE USE OF A NETWORK SYTSTEM FOR BIOFEEDBACK STRESS REDUCTION	
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Appellant's Brief

(i) Real party in interest.

The real party in interest is Marc Lemchen, an individual.

(ii) Related Appeals and Interferences.

There are no prior and pending appeals, judicial proceedings or interferences known to the appellant which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(iii) Status of Claims.

Claims 1 – 24 were original in the application. Claims 2 - 9 and 14 – 21 have been cancelled without prejudice. Claims 1 and 13 have been amended. Claims 25 and 26 have been added. Claims 1, 13, 25 and 26 are subject to appeal.

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(iv) Status of Amendments.

An amendment after final was filed as placing the claims into allowable condition or in better form for appeal, but it was refused entry and thus not considered. A Pre-Appeal Brief Review was requested and performed without resulting in any action on the claims or amendment thereto.

(v) Summary of Claimed Subject Matter.

The claimed subject matter is a computer system for reducing mental stress in a person and a method using a computer to reduce stress. The system and method is arranged and configured so that a computer user, sitting in front of a personal computer in an office, home or any other location, can perform exercises while seated, which will tend to reduce emotional, nervous or mental stresses. Many computer users spend long hours in front of a computer and short, repeated stress reduction exercises can be performed through the computer which can materially reduce the stress levels of the user.

Claim 1

Claim 1 is directed to a biofeedback system for treating stress in a user by use the computer network, e.g. a client computer connected through the internet to a remote master computer, and one or more biosensors coupling the client computer to the computer user. The client computer runs a network controlled program which generates a modifiable schedule of stress reduction exercises which are personalized to the user. The stress reduction exercises are to be performed by the user interactively

through use of the client computer and network. These stress reduction exercises are conventional mental exercises, breathing or relaxation exercises. They are not exercises to provide for physical fitness.

The computer receives biofeedback input from the user through sensors coupled to the user. The computer monitors compliance by the user with the schedule of stress reduction exercises. The schedule is modifiable according to the: (1) compliance of the user with the schedule; (2) performance of the user in the stress reduction exercises; (3) situational events to which the user is subjected; (4) biofeedback from the user during performance of the stress reduction exercises; or at times other than during the performance of the stress reduction exercises, (5) information input into the computer by the user relating to his or her personalized stress characteristics, and/or (6) information input into the computer by the user relating to his or her personalized stress related history.

Claim 25

Claim 25 is similar to claim 1 in that it too is directed to a biofeedback system in a computer network for treating stress. In this embodiment the program generates a dynamically modified schedule of stress reduction exercises personalized to the user. The schedule of stress reduction exercises are modified according to the compliance of the user with the schedule, user's stress status, and/or user performance, and at least one sensor to sense body stress signals from the user to provide the automatic biofeedback input to the computer.

Claim 13

Claim 13 is directed to a method of reducing stress using a computer network. The method comprises the steps of automatically inputting personal stress factors relating to a user from sensors through a user's client computer coupled to the computer network. The body stress signals are received from the user at the master computer. A modifiable schedule of stress reducing exercises is generated in the master computer which is personalized to the user and which is to be performed interactively by the user by use of the client computer. Compliance by the user with the schedule of stress reduction exercises on the user's client computer is monitored and can be scored or rated. The schedule can be modified according to the same variety of factors listed in connection with claim 1.

Claim 26

Claim 26 is similar to claim 13 in that it is also directed to a method of reducing stress using a computer network, and employs a modifiable schedule according to the compliance of the user with the schedule, user's stress status and/or user performance.

(vi) Grounds of Rejection to be Reviewed on Appeal.

Does Pyles disclose identically each and every element of claim 1?

Does Pyles disclose identically each and every element of claim 13?

Does Pyles disclose identically each and every element of claim 25?

Does Pyles disclose identically each and every element of claim 26?

(vii) Argument.

Rejection Pursuant to 35 U.S.C. 102(e)

Federal Circuit Decisions for Novelty Require Strict Identity, and Not Substantial Identity, of the Subject Matter in the 102 Reference with the Claimed Subject Matter.

There is no strict identity between the disclosure in Pyle and the claimed subject matter. Federal Circuit decisions repeatedly emphasize that lack of novelty or anticipation is established only if each and every element of an invention, as stated in the subject patent claim, is identically set forth in a single prior art reference. Federal Circuit decisions, explicitly or implicitly, reject any standard of "substantial identity."¹

¹ See Key Pharmaceuticals v. Hercon Laboratories Corp., 161 F.3d 709, 718-19, 48 USPQ2d 1911, 1919 (Fed. Cir. 1998) (claim to a "drug in adhesive" transdermal patch requiring a dosage of at least 2.5 mg/day is not anticipated by a reference showing a patch with a dosage calculated to deliver a maximum of 2.0 mg/day; the infringer argued that the prior art reference "would merely have to be increased in size by 25 percent to deliver 2.5 mg/day, and ... this is inherently taught by ... the ... reference. However, as the trial court's findings indicate, these assertions lack the kind of support in the record needed for proof of invalidity by clear and convincing evidence."); PPG Industries, Inc. v. Guardian Industries Corp., 75 F.3d 1558, 1566, 37 USPQ2d 1618, 1624 (Fed. Cir. 1996) (the district court correctly found a patent's claims not anticipated but it "did not articulate the correct legal standard when it stated that to invalidate a patent the prior reference must 'give the same knowledge and the same directions' as the challenged patent." ; "To anticipate a claim, a reference must disclose every element of the challenged claim and enable one skilled in the art to make the anticipating subject matter."); Credle v. Bond, 25 F.3d 1566, 1578, 30 USPQ2d 1911, 1921 (Fed. Cir. 1994) (a reference that discloses a "flexible" element does not anticipate a claimed invention that requires that the element be "flexibly" secured to an object. "Nothing ... prevents the existence of a perfectly secure, inflexible bond between the end of a flexible member and another inflexible object"); Scripps Clinic & Research Foundation v. Genentech, Inc., 927 F.2d 1565, 1576, 18 USPQ2d 1001, 1010 (Fed. Cir. 1991) ("Invalidity for anticipation requires that all of the elements and limitations of the claim are found within a single prior art reference... . There must be no difference between the claimed invention and the reference disclosure, as viewed by a person of ordinary skill in the field of the invention."); Richardson v. Suzuki Motor Co., Ltd., 868 F.2d 1226, 1236-37, 9 USPQ2d 1913, 1920-21 (Fed. Cir. 1989), *cert. denied*,

In *Jamesbury Corp. v. Litton Industrial Products, Inc.* (1985),² the Federal Circuit held that a jury instruction that a patent is invalid for lack of novelty if the prior art "disclosed substantially the same things" was erroneous. It noted that a verdict of invalidity for anticipation should be overturned when reasonable persons could not find the evidence clear and convincing that all the claim limitations were met by the prior art reference in question. Emphasizing "the rigors of anticipation," the Federal Circuit, in *Motorola, Inc. v. Interdigital Technology Corp.* (1997),³ held that a jury's verdict that one patent claim was anticipated by a prior art reference could not stand because the reference lacked a limitation the claim required. An expert's conclusory testimony based on the state of the art could not "supplant the requirement of anticipatory disclosure in the prior art reference itself."

A Single Basis of Rejection of Claims 1, 10 – 13, and 22 – 26

There is a single ground of rejection outstanding against claims 1, 10 – 13, and

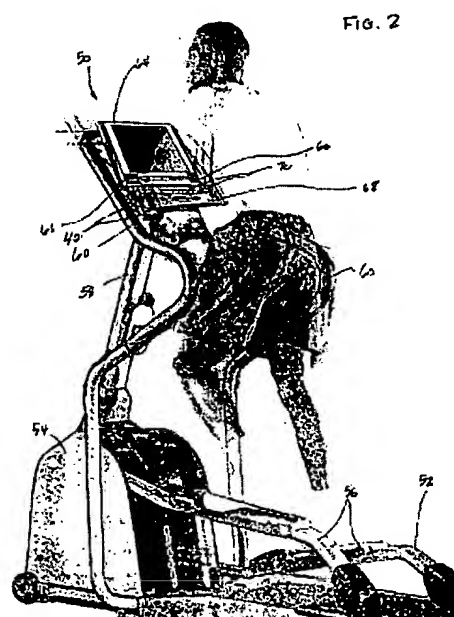
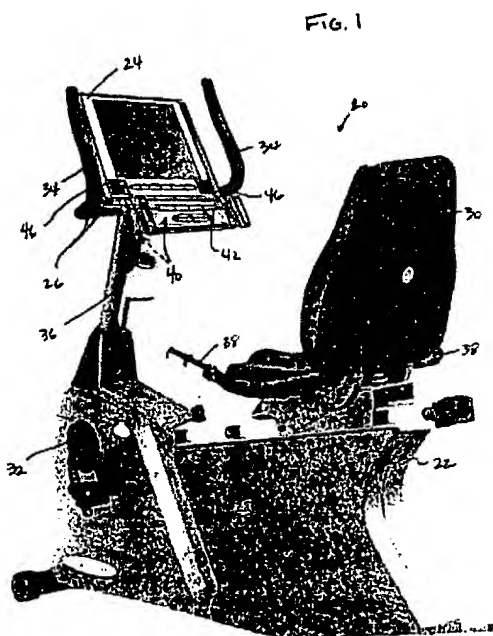
493 U.S. 853 (1989) (the district court erroneously instructed the jury that anticipation may be shown "by equivalents", which is "a legal theory that is pertinent to obviousness under Section 103, not to anticipation under Section 102."; "The jury requested a definition of 'equivalent' during its deliberations, and was given the Webster's dictionary definition 'corresponding or virtually identical, especially in effect or function.' This narrow definition, which does not accord with that of *Graver Tank*, [the leading Supreme Court decision on infringement under the doctrine of equivalents,] may have minimized the legal error in the instructions."; "Every element of the claimed invention must be literally present, arranged as in the claim."); Titanium Metals Corp. v. Banner, 778 F.2d 775, 780, 227 USPQ 773, 777 (Fed. Cir. 1985) ("anticipation under § 102 can be found only when the reference discloses exactly what is claimed"; "where there are differences between the reference disclosure and the claim, the rejection must be based on § 103 which takes differences into account").

² Jamesbury Corp. v. Litton Industrial Products, Inc., 756 F.2d 1556, 1560, 225 USPQ 253, 256 (Fed. Cir. 1985), later appeal 839 F.2d 1544, 5 USPQ2d 1779 (Fed. Cir. 1988), cert. denied, 488 U.S. 828 (1988).

22 – 26. Each of the claims is rejected as being anticipated by Pyles et al US Patent Publication 2002/0055418. First we shall consider the teachings of Pyles as cited and then turn to each claim at issue and the grounds of its distinction over Pyles.

Pyles is characterized *inter alia* as directed to stress reduction exercises interactively based on user biofeedback. Nowhere does Pyles refer to emotional or neurological stress reduction exercises or to user biofeedback. Pyles refers instead to physical exercise.

Pyle discloses a workout machine which has a computer which allows fitness and physical health programs to be employed. The exercise device is a cycling machine as shown in Fig. 1 or a stair stepper as shown in Fig. 2. There is no mention of a user sitting at a desk in front of a computer or elsewhere to use the computer itself to perform an emotional stress reduction exercise.



³ Motorola, Inc. v. Interdigital Technology Corp., 121 F.3d 1461, 43 USPQ2d 1481 (Fed.

Claim 1

In regard to claim 1 paragraphs [0008] – [0010] of Pyles is cited for showing a computer which is interactively used to execute a modifiable program for “stress reduction exercises”. However paragraph [0008] describes a fitness device including a computer and sensor for monitoring an exercise parameter. The sensor is used by the computer and certain Internet web sites to monitor and/or control the exercise program being carried out on the fitness device. In paragraph [0010] it is disclosed that the fitness device allows internet access to a data base of health and exercise information processed for individual users of the fitness equipment, including the user's personal workout and health history. The user can upload and display all pertinent exercise information, including workout history, goals, fitness programs, and even the weather and other sports related information for outdoor workouts. The web link and computers can generate control signals that adjust the fitness device to increase or decrease resistance and workout times to maintain a user's heart rate and exercise regimen. Goals for fitness can be input by the user through an operator interface, and the web site or computer will track progress, set new goals, or provide health information for the user. “*Stress reduction exercises*” are in fact never disclosed in these paragraphs.

In regard to claim 1 the Examiner cites paragraphs [0008] – [0014], [0028] – [0029], and [0033] – [0035] as disclosing biofeedback to a computer. The only biofeedback signal which is mentioned is heart rate. An increase in heart rate is an element of cardiovascular exercises for physical fitness. A decrease in heart rate is an element of relaxation states. Pyles mentions heart rate in the context of:

Cir. 1997).

"The web link and computers can generate control signals that adjust the fitness device to increase or decrease resistance and workout times to maintain a user's heart rate and exercise regimen." Para. [0010]

It is clear from context that adjustment of resistance and workout times is directed to cardiovascular exercises and not to meditation or relaxation, i.e. stress reduction exercises.

In regard to claim 1 paragraphs [0008] – [0014], [0028] – [0029], and [0033] – [0035] are also cited for disclosing using the computer to monitor compliance with a stress reduction exercise program. Pyles discloses monitoring physical fitness goals:

"Goals for fitness can be input by the user through an operator interface, and the web site or computer will track progress, set new goals, or provide health information for the user." Para. [0010]

Again fitness is the goal which is monitored and not success at reducing stress.

In regard to claim 1 paragraphs [0008] – [0014], [0028] – [0029], and [0033] – [0035] are also cited for disclosing a modifiable schedule of stress reduction exercises. The above cited passage discloses setting new fitness goals but not modifying a stress reduction strategy.

In regard to claim 1 paragraphs [0008] – [0014], [0028] – [0029], and [0033] – [0035] are also cited for disclosing modification of the stress reduction program according to the situational events occurring to the user, and according to his or her performance in successful stress reduction. Again no stress reduction exercises are disclosed. Only the monitoring of heart rate for fitness exercises is disclosed. A situational event is a situation that occurs to the user, like a stressful event at the office where the user is under time pressures to complete a job or work load is excessive. The use of such a situational event is not even remotely within the contemplation of

Pyles.

In regard to claim 1 paragraphs [0008] – [0014], [0028] – [0029], and [0033] – [0035] are also cited for disclosing modification of the stress reduction program according to personalized stress characteristics of the user or his or her stress-related history. Pyles discloses:

“When the Internet site portal is accessed, a special data base having that user's personal workout and health history can be accessed.” Para. [0010]

The referenced history in Pyles is a personal workout and health history and not stress-related history, nor is there any reference to personalized stress characteristics of the user. Moreover, Pyles never discloses what is to be done with the personal workout and health history. All that is disclosed is that resistance and workout times to maintain a user's heart rate and exercise regimen are adjusted. One is left to assume without explicit disclosure that the personal workout and health history in database, which is disclosed only as being informational, might be used to make the adjustment.

In regard to claim 1 paragraphs [0008] – [0014], [0028] – [0029], and [0033] – [0035] are also cited for disclosing automatic biofeedback to the computer. Again only heart rate feedback is mentioned and this is provided only for fitness performance.

Claim 13

The same paragraphs [0008] – [0014], [0028] – [0029], and [0033] – [0035] are cited for disclosing each and every one of the elements of claim 13. The same distinctions as cited for claim 1 also exist for claim 13.

In regard to claim 13 Pyles does not disclose a method of reducing stress.

In regard to claim 13 Pyles does not disclose automatically inputting personal stress factors relating to a user.

In regard to claim 13 Pyles does not disclose receiving body stress signals from the user. A reduction in heart rate is not a stress signal and this is the stress signal which would be sensed in the claimed invention.

In regard to claim 13 Pyles does not disclose generating a modifiable schedule of stress reducing exercises personalized to the user.

In regard to claim 13 Pyles does not disclose stress reducing exercises which are themselves performed interactively by the user by use of the computer based on the personal stress factors relating to the user. Pyles uses a cycling and stepping machine and not a computer to perform the exercise. It is not disclosed that these machines are controlled during their use to interact with the user for purpose of stress reduction.

In regard to claim 13 Pyles does not disclose monitoring compliance by the user with the schedule of stress reduction exercises performed on the user's client computer.

In regard to claim 13 Pyles does not disclose modifying a schedule of stress reduction exercises according to the compliance of the user with the schedule. Pyles discloses setting new fitness goals, but it is not disclosed on what basis or ground such new goals are set. Compliance with a schedule as such a basis is not disclosed.

In regard to claim 13 Pyles does not disclose modifying a schedule of stress reduction exercises according to the performance of the user in the stress reduction exercises. As stated above while the setting of new fitness goals is mentioned, using how well the user performs meditation or relaxation exercises is not a disclosed basis,

rather heart rate is the only suggested basis for adjustment of machine resistance and workout times.

In regard to claim 13 Pyles does not disclose modifying a schedule of stress reduction exercises according to situational events to which the user is subjected. For example, the fact that Pyles' user was up all last night with a sick baby and is tired, is not a consideration in program modification of the fitness program.

In regard to claim 13 Pyles does not disclose modifying a schedule of stress reduction exercises according to biofeedback from the user during performance of the stress reduction exercises. Again, heart rate is used, but not for a schedule of stress reduction exercises, e.g. meditation or relaxation techniques.

In regard to claim 13 Pyles does not disclose modifying a schedule of stress reduction exercises at times other than during the performance of the stress reduction exercises according to information input into the computer by the user relating to personalized stress characteristics of the user. Pyles is concerned only with using performance during the exercise itself as a basis of program adjustment. The claimed subject matter includes providing personalized stress characteristics of the user which manifest themselves at times other than when the user is involved in stress reduction exercises as a basis for program modification. This is an aspect of program control not even remotely considered by Pyles.

In regard to claim 13 Pyles does not disclose modifying a schedule of stress reduction exercises at times other than during the performance of the stress reduction exercises according to information input into the computer by the user relating to personalized stress related history of the user. The same arguments as stated in the

preceding paragraph are made here, but with respect to the person stress history of the user. For example, perhaps it is determined that the user experiences an elevated blood pressure every time he or she commutes to work in the morning as the carpool driver. The stress reduction program can be modified to accommodate that history by providing a different kind of exercise program for 3 minutes in the morning where the user indicates that he or she was the carpool driver that day.

Claim 25

The same paragraphs [0008] – [0014], [0028] – [0029], and [0033] – [0035] are cited for disclosing each and every one of the elements of claim 25. The same distinctions as cited for claim 1 and 13 also exist for claim 25.

Claim 25 is a broader apparatus claim than claim 1 in several respects, but is similarly distinguished from Pyles by claiming a biofeedback system for treating stress comprised of a program controlled computer which provides a dynamically modified schedule of stress reduction exercises personalized to the user which are interactively performed through use of the computer. The modification of the schedule of stress exercises is based on the compliance of the user with the schedule, user's stress status, and/or user performance.


Claim 26

The same paragraphs [0008] – [0014], [0028] – [0029], and [0033] – [0035] are cited for disclosing each and every one of the elements of claim 25. The same

distinctions as cited for claim 1, 13 and 25 also exist for claim 26, which is a method claim analogous to claim 25.

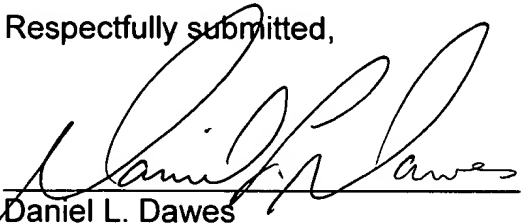
The Applicant respectfully submits that each and every element of the claimed subject matter in claims 1, 13, 25, and 26 is not disclosed by Pyles and respectfully requests advancement of the claims to allowance.

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Signature

January 15, 2007

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VIII. Claims Appendix.

1. A biofeedback system in a computer network for treating stress in a user of the computer network comprising:

a program controlled computer coupled to the computer network for executing a program to generate a modifiable schedule of stress reduction exercises personalized to the user and which stress reduction exercises are to be performed by the user interactively through use of the computer, the computer receiving biofeedback input from the user, the program controlled computer monitoring compliance by the user with the schedule of stress reduction exercises, the schedule being modifiable according to the compliance of the user with the schedule, according to the performance of the user in the stress reduction exercises, according to situational events to which the user is subjected, according to biofeedback from the user during performance of the stress reduction exercises or at times other than during the performance of the stress reduction exercises, according to information input into the computer by the user relating to personalized stress characteristics of the user, and/or according to information input into the computer by the user relating to personalized stress related history of the user, and

at least one sensor to sense body stress signals from the user to provide the automatic biofeedback input to the computer, the body stress signals being communicated to the computer.

2. – 9. (cancelled)

10. The system of claim 1 further comprising a remote server hosting the program.
11. The system of claim 10 wherein the program is downloaded by the user from the remote server via the computer network and is run on the computer.
12. The system of claim 10 wherein the program is run directly from the remote server via the network.
13. A method of reducing stress using a computer network comprising:
 - automatically inputting personal stress factors relating to a user from sensors through a user's client computer coupled to the computer network;
 - receiving body stress signals from the user through the user's client computer;
 - generating a modifiable schedule of stress reducing exercises personalized to the user and to be performed interactively by the user by use of the computer based on the personal stress factors relating to the user;
 - monitoring compliance by the user with the schedule of stress reduction exercises on the user's client computer; and
 - modifying the schedule according to the compliance of the user with the schedule, according to the performance of the user in the stress reduction exercises, according to situational events to which the user is subjected, according to biofeedback from the user during performance of the stress reduction exercises or at times other than during the performance of the stress reduction exercises, according to information

input into the computer by the user relating to personalized stress characteristics of the user, and/or according to information input into the computer by the user relating to personalized stress related history of the user.

14. – 21. (cancelled)

22. The method of claim 13 wherein the schedule of stress reducing exercises personalized to the user is generated on a remote server coupled through the computer network to the user's client computer.

23. The method of claim 13 wherein the schedule of stress reducing exercises personalized to the user is generated on the user's client computer.

24. The method of claim 14 wherein monitoring compliance by the user with the schedule of stress reduction exercises on the user's client computer is performed on a remote server via the computer network.

25. A biofeedback system in a computer network for treating stress in a user of the computer network comprising:

a program controlled computer coupled to the computer network for executing a program to generate a dynamically modified schedule of stress reduction exercises personalized to the user and which stress reduction exercises are to be performed by the user interactively through use of the computer, the computer receiving biofeedback

input from the user, the program controlled computer monitoring compliance by the user with the schedule of stress reduction exercises, the schedule being modified according to the compliance of the user with the schedule, user's stress status, and/or user performance, and

at least one sensor to sense body stress signals from the user to provide the automatic biofeedback input to the computer, the body stress signals being communicated to the computer.

26. (new) A method of reducing stress using a computer network comprising:

automatically inputting personal stress factors relating to a user from sensors through a user's client computer coupled to the computer network;

receiving body stress signals from the user through the user's client computer;

generating a modifiable schedule of stress reducing exercises personalized to the user and to be performed interactively by the user by use of the computer based on the personal stress factors relating to the user;

monitoring compliance by the user with the schedule of stress reduction exercises on the user's client computer; and

modifying the schedule according to the compliance of the user with the schedule, user's stress status and/or user performance.